Filed 5/20/16 Marriage of A.M.S. and A.C.M. CA4/3
Received for posting 5/23/16

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of A.M.S. and A.C.M., JR.	
A.M.S., Appellant, v. A.C.M., JR., Respondent.	G051533 (Super. Ct. No. 09D004151) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Glenn R. Salter, Judge. Reversed and remanded.

Law Offices of Dorie A. Rogers, Dorie A. Rogers, Lisa R. McCall; Law Offices of Gary A. Perotin and Gary R. Perotin for Appellant.

No appearance for Respondent.

* * *

INTRODUCTION

The marriage of A.M.S. (Mother) and A.C.M., Jr. (Father), ended in dissolution, and they agreed upon joint legal and physical custody of their son, H.M., with equal parenting time. H.M., who was born in 2006, suffers from cystic fibrosis, a serious and chronic pulmonary condition. The relationship between Mother and Father has been contentious and hostile. They have differing notions of how H.M. should be raised and the nature of the care he should receive, and H.M. has suffered as a result.

Everyone—Mother, Father, H.M.'s counsel, and the trial court—recognized a change in the custody arrangement was necessary. Unfortunately, the trial court, though well intentioned, did not go about changing custody in the right way.

The trial court issued an order granting Father sole legal and physical custody of H.M. and permitting Father to move H.M.'s residence from Orange County to Lake Arrowhead. The trial court did so without following the rules and procedural safeguards required before making a move-away order when parents have joint custody.

A decision to allow one parent to move a child's residence is a serious one, should not be made in haste, and must be based on the best interests of the child determined after a hearing in which the parties have had an opportunity to be meaningfully heard. (*In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, 1119-1120 (*Seagondollar*); see *Jane J. v. Superior Court* (2015) 237 Cal.App.4th 894, 901 [following *Seagondollar*].) By not following the family law rules of procedure, the trial court deprived Mother of an opportunity to be meaningfully heard and created a record on which a determination of H.M.'s best interests could not be made. We therefore reverse and remand the order granting Father sole legal and physical custody.

FACTS AND PROCEDURAL HISTORY

I.

Background

Mother and Father married in 2005. Their son, H.M., was born in April 2006. Mother and Father separated in 2009, and Mother filed a petition for dissolution of marriage. In May 2012, a judgment of dissolution of marriage was entered following a contested trial. The judgment awarded Mother and Father joint legal and physical custody of H.M., with approximately equal parenting time. The judgment recited it is intended to be final pursuant to *Montenegro v. Diaz* (2001) 26 Cal.4th 249.

The judgment stated that Mother and Father had shared custody of H.M. and neither would be characterized as the primary parent. The judgment also stated: "Any parent contemplating a change to the child's residence shall give the other parent forty-five (45) day[']s advanced written notice by registered letter pursuant to Family Code Section 3024."

In December 2013, Mother filed an ex parte request for an order for modification of child custody and visitation, and for H.M. to be delivered to her at the Orange County Superior Court, with Father's visitation to be suspended pending a hearing. Mother asserted that Father had indicated he would refuse to turn H.M. over to her at the start of her next parenting time. The trial court set a hearing for January 13, 2014 and, pending the hearing, ordered Father to turn H.M. over to Mother at a sheriff's station.

The source of tension between Mother and Father was medical care for H.M., who had been diagnosed with cystic fibrosis. H.M. was initially diagnosed as having asthma. Mother disbelieved that diagnosis and believed H.M.'s condition was more serious. She persisted (against Father's wishes) and proved to be correct. It took

some time for Father to accept that H.M. had cystic fibrosis.[1] Mother and Father have disagreed over treatment and approach toward care.

II.

The January 13, 2014 Hearing

At the hearing on January 13, 2014, H.M.'s counsel gave an oral report on the relationship between Mother and Father and its effect on H.M. According to H.M.'s counsel, while Mother was "overprotective to the point that [H.M.] is actually shutting down or not attending school[]," Father was allowing H.M. to "lead a normal life." Mother was overprotective to the point at which the nurse practitioner described her as "borderline M[ü]nchausen." H.M.'s counsel reported that Mother and Father constantly argue in the clinic in front of H.M. The nurse practitioner had sent H.M.'s counsel a report stating: "Today in the clinic, there was palpable [tension] in the room between the biological mother, father, and stepmother. They were all verbally aggressive, argumentative, and confrontational in front of H[.M.] and the other children despite repeated requests by nurse practitioner and the social worker to stop arguing and behave in a more civil manner. When arguing between the parents reached a peak, the nurse practitioner with the parents' permission removed H[.M.] from the room and spoke with him in another room with the social worker present."

H.M.'s counsel reported that H.M. had been kicked out of Boy Scouts and baseball due to fighting between Mother and Father. When H.M. visited his counsel with

[1] At a hearing on January 13, 2014, the trial court stated: "[F]or quite some time, . . . and all of the evidence that came from [F]ather and the doctor that he saw, is that [H.M.] had asthma, and [M]other was the one who kept stepping forward and saying . . . that i[t] isn't asthma. It's serious. [¶] . . . I'm sure that [M]other became extremely frustrated with the fact . . . . [S]he was extremely frustrated by the fact that everyone had let [H.M.] down." The court added, "I don't know that we can just ignore the fact that [Mother] has been the one who recognized there was something wrong."

Mother, he was quiet and withdrawn; when he visited his counsel with Father, he was "very excited, very animated, very happy." H.M.'s teacher reported that when Father has custody, H.M. is very active, but, when Mother has custody, is very subdued and misses a lot of school. Custody exchanges were being made at a police station with a police officer present.

H.M.'s counsel believed that H.M. was "desperate" for a change and suggested granting Father primary custody with alternate weekends to Mother. The trial court agreed with H.M.'s counsel that Mother and Father should attend coparenting classes, a cystic fibrosis support group, and counseling, but left custody and visitation "as it currently is."

III.

Father's and Mother's Requests for Orders Modifying Custody and Visitation

Five months later, in June 2014, Father filed an ex parte request for an order modifying custody and visitation to give him sole legal and physical custody of H.M., with visitation to Mother on alternate weekends. The basis for the request was that Mother allegedly was making inappropriate medical decisions for H.M. Father requested the exclusive right to make medical decisions for H.M., control over H.M.'s medications, and for Mother to be excluded from H.M.'s doctor's appointments. Father also requested that H.M. be allowed to change schools. In the supporting declaration, Father described an incident at Children's Hospital of Orange County (CHOC) in which, he claimed, Mother "made an attempt to strike [him] on the shoulder" and his new wife had to restrain Mother. Father declared, "[t]his matter has become extremely urgent as the circumstances have become so unbearable that [CHOC] is going to excuse [itself] from H[.M.]'s case if a court order is not in place to determine which parent is more suitable to accompany [H.M.] to his appointments."

Mother opposed Father's ex parte request and asserted the reason CHOC would no longer treat H.M. was Father's refusal to sign a hospital form agreeing to exhibit respectful communication at the hospital, participate in making decisions about H.M.'s care and treatment, follow the plan of care, not obstruct hospital staff's ability to provide H.M. medical care, and to limit visitors to Mother and Father. Mother signed the form, which concluded with the warning, "[i]f the above is not met, the Pulmonary Team will recommend that the patient and family seek treatment at another facility." In opposition to Father's ex parte request, Mother submitted a document, entitled "Emergency Department Documentation," from CHOC, which had these notes for December 6, 2013: "[Patient's] biologic father and [current] wife came to the ER right when patient was being discharged. They were both verbally aggressive and started to confront both [patient's] biologic mother and staff. Dad demanded pulmonary function testing which I told him was not medically necessary at this time. Dad became more aggressive which prompted security to be called. Mom was escorted out by security and eventually dad was also escorted out by security."

In July 2014, Mother filed a responsive declaration opposing Father's request for sole legal and physical custody of H.M. Mother requested that she be given sole legal and physical custody of H.M., with monitored visits for Father, and requested that Father's wife be excluded from all of H.M.'s medical or medically related appointments. Mother provided a "catalog" of Father's purported "derelictions," which Mother described as "expansive and profound."

A hearing on Father's ex parte request was conducted on July 7, 2014. The court minutes for that date state, "[t]he Court notes there is a pending investigation with the Department of Social Services" and "[t]he Court admonishes [Father] as to his demeanor in court." The court continued the hearing to August 7, 2014, "pending the completion of the investigation with Social Services." (Boldface omitted.)

On July 25, 2014, Mother filed an ex parte request for an order modifying child custody and visitation. She requested sole legal and physical custody of H.M. and that Father's visitation be suspended temporarily because Father had moved to Lake Arrowhead and had refused to give her his new address. Mother expressed concern that the drive to Lake Arrowhead was about two and half hours each way, mountain air was not good for H.M., and H.M.'s family, friends, school, athletic activities, and church all were located in south Orange County. The trial court denied the request pending a hearing, which was scheduled for August 7, 2014 at 3:30 p.m.

On July 25, 2014, H.M.'s counsel filed a declaration describing her attempts to get Father to disclose his new address in Lake Arrowhead. On July 22, staff for H.M.'s counsel had sent Father an e-mail, requesting the physical address of his home in Lake Arrowhead (Father had provided only a post office box). Father sent H.M.'s counsel an e-mail with his new address at 11:28 a.m. on July 24.

Father also filed a declaration on July 25, 2014. He again requested sole legal and physical custody of H.M. with no visitation to Mother. Father asserted that Mother "suffers from bi-polar disorder and seems to be having an episode" and was exhibiting "paranoid behavior." Father claimed that Mother was disobeying a court order regarding H.M.'s medication and had refused to discuss a new treatment facility for H.M.

IV.

The August 7, 2014 Hearing

At the August 7, 2014 hearing, the trial court had before it two competing and incompatible requests: Father's June 2014 request for an order granting Father sole legal and physical custody of H.M., and Mother's July 2014 request for an order granting Mother sole legal and physical custody of H.M. Father had not requested a move-away order along with his request for sole legal and physical custody.

At the hearing, H.M.'s counsel explained that she had spoken to Dr. Bruce Nickerson, the chief of pulmonology at CHOC, and he had told her there was "no way, no how" H.M. would be treated there due to Mother's and Father's prior behavior. Dr. Nickerson said neither parent was worse than the other, but CHOC could not tolerate their disruptive conduct when the hospital was trying to treat patients. Dr. Nickerson told H.M.'s counsel he had referred Mother and Father to four other medical facilities for H.M.'s treatment. H.M.'s counsel explained that efforts to find a parenting therapist had not been successful, and two therapists had refused to take the case.

H.M.'s counsel expressed her frustration with the matter: "I have 25 sheets of just contacts trying to get things done in this case, constant contacts trying to get things done. [¶] And then as we approach[ed] July 25th, Dad's moved and that wasn't put at issue in his June 6th request for order. Mom put it at issue because she couldn't get an address out of [Father] and neither could we. [¶] It's been extremely frustrating on every end of this case as far as H[.M.], who is eight, who needs consistent care. And one of the things that he needs is to be close to a facility according to the doctors. And we don't have that for him. . . . I can read into the record pages and pages and pages of attempted contact, attempted allegation, misrepresentations by both sides, undermining . . . medication transfers, undermining coparenting. [¶] . . . I think everybody has quit this case. All medical personnel and all conjoint therapists have quit this case, except for my office trying to work on behalf of H[.M.] and this court, but I'm not getting any change in the behavior of either parent to work for the benefit of H[.M.]."

When pressed by the trial court to come up with an answer to the problem, H.M.'s counsel replied she was "at a loss." H.M. had expressed a preference to live with Father because with him, "I get to be a kid." When asked about what he got to do while with Mother, H.M. conceded she let him do things, with the qualification "but that was just once." In sum, H.M.'s counsel believed the court should not rely on H.M.'s preference in making a decision.

H.M.'s counsel stated that while Mother had been described as "a little overprotective," she was not inappropriate or abusive. H.M.'s counsel described Father as "on the far other side of the spectrum of let him be a kid." Father had claimed H.M. is not "sick all the time" while in his care; Mother claimed H.M. would be sick when he came back from staying with Father and would be "sick all the time."

H.M.'s counsel concluded: "[W]ill these parents learn how to coparent? I have not seen any fact that I could tell this court that would le[a]d the court to believe that they will, not one." H.M.'s counsel recommended that H.M. live with Mother on a temporary basis and continue to attend school in Orange County and that H.M. spend as many weekends, holidays, and "non-school time" as possible with Father.

Mother presented one witness, Dr. Bradley J. Monk, who was to testify as an expert on cystic fibrosis. After voir dire by H.M.'s counsel and by Father, the trial court ruled that Dr. Monk did not qualify as an expert and did not let him testify. No other witnesses were presented.

Father, who represented himself, proceeded. He had been sworn in at the beginning of the hearing.

Father explained that he had filed his ex parte request in response to the incident at CHOC. Since filing the ex parte request, he had moved to Lake Arrowhead. He had had no intention to move, but circumstances had changed and moving to Lake Arrowhead would enable him to maintain his level of income. Father added, "[i]t's H[.M.]'s dream to live in the mountains." Mother's counsel asserted a hearsay objection. The court stated it would permit Father to "testify" but assured counsel, "the court is not going to consider evidence which is not otherwise admissible."

Father stated he had taken H.M. to Loma Linda Hospital for a checkup and pulmonary function test, and H.M.'s oxygen saturation level was 98 percent. Mother's counsel moved to strike on hearsay grounds. The trial court, without ruling on the motion, permitted Father to continue. The court soon interrupted Father and asked him

to focus on the issue of custody arrangement inasmuch as the current arrangement was "not going to work in this situation with you having moved to Lake Arrowhead." The court asked, "[h]ow do we set up the parenting time, again all looking out for what is in the best interests of the child." Eventually, Father stated: "[A]fter six years of what we've been through, the court's been through, the investigation that [H.M.'s counsel] has done, I believed H[.M.] is better with me full-time and alternating weekends to his mom. It has nothing to do with school. Lake Arrowhead Elementary has a nine rating and the public schools by law have to accommodate medical and just general needs to a child. And H[.M.] wants to be there and he wants to be with his brothers and his siblings."

Mother's counsel argued H.M. had no connection with Lake Arrowhead: his school, family, friends, athletic activities, and church are in Orange County. Father had given only two or three days' notice of the move. There was no reason to grant a move-away order: "[W]e have a child with [cystic fibrosis] who has to live half the time in a high altitude. He has to live half the time in a car. It's not right. It's not in his best interests. There's absolutely no reason to shift custody to dad. [¶] How should custody and visitation look? I think [H.M.'s counsel] was driving the train correctly. I think dad should have two or three weekends a [month], I think a portion of the summer for vacation, a portion of the holidays and nonschool days. [¶] I don't know what to do about the drive because I think it's only common sense that that's going to be onerous for a young man with a lung problem. He chose to move up there. He had his own reasons and now the child takes it in the shorts. Somehow that doesn't seem right."

H.M.'s counsel argued: "The court has to try and figure out for these people, primarily H[.M.], what's the very best thing to do so that this child has some peace and can get healthy. And that's an extremely tall order because no one . . . has been able to bring any peace to this case, no one. [¶] So I think this move put a last-minute wrench in this case right before we came to court and that makes it an even harder decision of what to do right now for H[.M.] that he starts school somewhere and

has a stable education. [¶] But I can't sit here in all honesty and tell the court, 'you should place with [F]ather. He's a much better placement. My client wants to go there. My client wants to live with him and his siblings.' Or, 'you should place with [M]other because she's the much better parent and she's really on top of the medication to the point where she . . . has it all handled.' I can't tell the court that. I can't make that suggestion." H.M.'s counsel saw no solution unless one parent would stop "undermining" the other and both Mother and Father stopped "doing all the things that have made this child's life so difficult."

V.

The Trial Court's Order

The trial court took the matter under submission. Eleven days later, on August 18, 2014, the court issued a written order granting Father's request for sole legal and physical custody. The order stated: "This is a very high conflict case and H[.M.] is suffering emotionally and physically. This is primarily because the parents are unable to set aside their personal dislike and put H[.M.] and his medical condition first. But if there is one thing on which the parents and minor's counsel all agree it is this: There has to be a fundamental change in the custodial and parenting time arrangement."

The order reviewed in some detail the January 13, 2014 hearing, at which H.M.'s counsel recommended granting Father primary custody, then summarily reviewed the August 7, 2014 hearing. The order noted that it was clear that nothing had changed except that the pulmonary unit at CHOC would no longer treat H.M. due to Mother and Father.

The order explained the trial court's reasons for granting Father's request for sole legal custody: "It has been impossible for these two parents to co-parent. Joint legal custody has not worked and a new arrangement must be made. It has been so unsuccessful that CHOC . . . refuses to treat H[.M.] anymore under any circumstance.

Moreover, continuing that arrangement will only continue the fighting and that is not in H[.M.]'s best interest. [¶] Choosing between the parents is not easy. Each parent has strengths; and each parent has weaknesses. At the January 13, 2014 hearing, minor's counsel gave an extensive recitation of how H[.M.] interacted with his parents, at school, and what his preference was. Minor's counsel also stated she thought [Father] should have sole legal custody. The court adopts as its own minor's counsel's explanation as the reasons why sole legal custody should be awarded to [Father] at this time. The court has independently reviewed the record and has come to the same conclusion as minor's counsel—including her lament that she 'actually hates to say it,' but it is the only arrangement that will work for now."

The order gave these reasons for granting Father's request for sole physical custody: "Not only has it been impossible for these two to co-parent, but it has been equally impossible for them to exercise time with H[.M.]. Everything is centered on his medical condition. It is now time to remove the medical condition from its dominant perch and allow H[.M.] to be a child like other children. Minor's counsel—and the nurse practitioner—both pointed out that cystic fibrosis does not prevent those afflicted from carrying on a normal life. [Mother] has refused to let H[.M.] be a normal child. [Father] has. . . . The court adopts as its own reasons the explanation given by minor's counsel on January 13, 2014, as to why custody should be awarded to [Father]. The court has independently reviewed the record and has come to the same conclusion for the same reasons."

The order next addressed Father's move to Lake Arrowhead which, according to the order, nobody addressed at that August 7 hearing. The court applied the factors identified in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072,[2] in deciding

[2] Those factors include "the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not

whether to grant a move-away request "because it is an additional way of looking at what is in the best interest of the child." The order concluded: "Given the animosity between these parents, their inability to co-parent, and the medical condition of the child, the court finds it is in the best interest of the child to relocate to Lake Arrowhead with [F]ather. H[.M.] needs to be allowed to be a child. He can only do that with [F]ather."

VI.

Mother's Motion for a New Trial

In September 2014, Mother, through counsel, filed a motion for a new trial. Mother argued, among other things, that a move-away had not been raised by the pleadings, the trial court relied (over her objection) on inadmissible hearsay, and the trial court did not conduct an evidentiary hearing. Both Father and H.M.'s counsel opposed the motion for a new trial.

Mother's motion for a new trial was heard on October 24, 2014. Mother's counsel stated, "[t]he bottom line is, this case was tried in a 50-minute period and, then, with pretty new material; to wit, the lack of a [social services agency] report that the court wanted for the trial date; number two, the move-away, which was never really considered by the court the way [*In re Marriage of*] *LaMusga* would seem to provide." (Italics added.) Mother's counsel argued that just four to five weeks before the August 7 hearing, he had learned Father had moved and struggled to find an expert to testify. The court noted that Dr. Monk did not qualify as an expert. Mother's counsel agreed, but stated, "it was the best we could do when we don't get the 45-day statutory notice. [¶]

---

limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (*In re Marriage of LaMusga*, *supra*, 32 Cal.4th at p. 1101.) This list is not exhaustive. (*Jane J. v. Superior Court*, *supra*, 237 Cal.App.4th at p. 905.)

. . . [¶] . . . But 45 days is the statutory standard for giving notice of a move-away. No one would argue that we got 45 days' notice of that move away; so we got what we got."

The trial court told Mother's counsel that it believed it made the right decision in granting Father sole custody and the move-away issue was "really sort of a[n] . . . add on." The court denied the motion for a new trial as untimely but stated, "I would add, however, that the court would—in order to rule on the merits, I would adopt the basic position taken by minor's counsel in terms of the analysis." Mother timely filed a notice of appeal.

DISCUSSION

I.

Legal Framework

"Once the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, 'the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining' that custody arrangement. [Citation.]" (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 956.) The changed circumstance rule, which is a variation on the best interest standard, applies when a parent seeks modification of a final judicial custody determination. (*Ibid.*) "Under the changed circumstance rule, custody modification is appropriate only if the parent seeking modification demonstrates 'a significant change of circumstances' indicating that a different custody arrangement would be in the child's best interest. [Citation.] Not only does this serve to protect the weighty interest in stable custody arrangements, but it also fosters judicial economy. [Citation.]" (*Ibid.*)

A parent with sole custody "has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or

welfare of the child." (Fam. Code, § 7501, subd. (a).) In a move-away case, a change of custody from the custodial parent to the noncustodial parent is justified only if, as a result of relocation with the custodial parent, the minor child will suffer detriment rendering a change in custody to be essential or expedient for the child's welfare. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 38 (*Burgess*).)

However, "[a] different analysis may be required when parents *share* joint physical custody of the minor children under an existing order and in fact, and one parent seeks to relocate with the minor children." (*Burgess*, *supra*, 13 Cal.4th at p. 40, fn. 12.) "In such cases, if it is shown that the best interests of the children require modification or termination of the order, the court 'must determine de novo what arrangement for primary custody is in the best interest of the minor children.'" (*In re Marriage of LaMusga*, *supra*, 32 Cal.4th at p. 1089, fn. 3.) "'The best interests of the children require that competing claims be considered in a calm, dispassionate manner and only after the parties have had an opportunity to be meaningfully heard.'" (*Seagondollar*, *supra*, 139 Cal.App.4th at p. 1120.)

II.

The Trial Court Erred by Not Following Procedures Required for a Move-away Order.

In the final custody determination, Mother and Father were given joint legal and physical custody of H.M. with approximately equal parenting time. Because Mother and Father had joint custody, neither had the presumptive right to change H.M.'s residence. (Fam. Code, § 7501, subd. (a); see *Burgess*, *supra*, 13 Cal.4th at p. 38.) Father was required to seek and obtain a court order permitting him to change H.M.'s residence.

Both Father's June 2014 request and Mother's July 2014 responsive declaration and request for modification sought a modification of the custody

arrangement. Father did not, however, request a move-away order in his June 2014 request, which sought only an order modifying custody and visitation. *Father never requested a move-away order as affirmative relief.* (See *Seagondollar, supra*, 139 Cal.App.4th at pp. 1127-1128 [necessary to seek move-away order as affirmative relief].) Rule 5.92(a)(4) of the California Rules of Court provides that a request for order must "set forth facts sufficient to notify the other party of the declarant's contentions in support of the relief requested." Father's declaration in support of the June 2014 request for order did not set forth facts or contentions in support of moving H.M.'s residence to Lake Arrowhead. Nor could it have because Father moved to Lake Arrowhead *after* he had filed his June 2014 request. When Father's June 2014 request was first heard on July 7, 2014, Father did not mention that he had moved and did not request a move-away order. Because Father had not requested a move-away order, the trial court could not grant one. (See *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 640 [modifications to support order exceeded family court's jurisdiction because "they were not based on any pending motion or OSC [(order to show cause)] for modification"].)

In addition, Father did not provide the 45-day notice required by the judgment and Family Code section 3024. The judgment stated: "Any parent contemplating a change to the child's residence shall give the other parent forty-five (45) days[']advanced written notice by registered letter pursuant to Family Code Section 3024." Family Code section 3024 states in relevant part: "In making an order for custody, if the court does not consider it inappropriate, the court may specify that a parent shall notify the other parent if the parent plans to change the residence of the child for more than 30 days, unless there is prior written agreement to the removal. The notice shall be given before the contemplated move, by mail, return receipt requested, postage prepaid, to the last known address of the parent to be notified. A copy of the notice shall also be sent to that parent's counsel of record. To the extent feasible, the notice shall be

provided within a minimum of 45 days before the proposed change of residence so as to allow time for mediation of a new agreement concerning custody."

Use of the word "shall" denotes a mandatory act. (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 542.) Father was therefore required to give notice at least 45 days before he moved residence. There was nothing infeasible about providing that notice.

Although Mother knew that Father had moved to Lake Arrowhead at the latest by July 25, 2014 (when she filed her ex parte request), we cannot characterize the procedural errors as harmless or academic. We disagree with Mother's claim that the trial court did not conduct an evidentiary hearing on August 7, as required by Family Code section 217, subdivision (a). An evidentiary hearing of sorts was conducted; the problem was that a full evidentiary hearing on proper notice, based on a motion seeking a move-away order as relief, was necessary and required before the trial court could determine whether granting Father sole legal and physical custody and allowing Father to change H.M.'s residence was in H.M.'s best interest.

At the August 7 hearing, H.M.'s counsel recognized a full move-away hearing was necessary, stating, "we have a move-away . . . here. . . . [T]he court is going to have to hear a move-away hearing because this case is so detailed and there's so many facts back and forth." Yet the trial court held the hearing on the competing requests for orders in one hour time at the very end of the day. Notwithstanding the comments by H.M.'s counsel, the trial court stated in the August 18, 2014 order that "[n]o one addressed the issue of 'relocation.'"

A full evidentiary hearing on proper notice was particularly necessary here because H.M. suffers from cystic fibrosis and Father had moved to a high elevation. Mother called Dr. Monk as an expert witness, but the trial court ruled he was not an expert on cystic fibrosis. While Mother does not challenge that ruling, her counsel stated at the hearing on the motion for a new trial that Dr. Monk "was the best we could do

when we don't get the 45-day statutory notice." Expert medical testimony not only would be desirable, but necessary, to determine the best interests of H.M. in light of his medical condition. The only information provided at the hearing about the condition of H.M. was Father's representation that his oxygen saturation level was 98 percent. Father's representation was inadmissible hearsay and was made without explanation of the significance of that score or the context in which the testing was performed. At the very least, Mother (and Father) should have sufficient time to attempt to locate and retain qualified medical experts who would be able to testify.

In addition, the Orange County Social Services Agency (SSA) had launched an investigation of Mother and Father. The trial court continued the July 7 hearing pending the completion of the investigation. By the time of the August 7 hearing, SSA apparently had two open investigations. At the August 7 hearing, the court noted that a new family court liaison had been appointed, the new liaison was not in a position to testify, and the only other person who might have been able to testify about the investigation was on vacation. Rather than continue the hearing, the court simply decided, "that's just the way it is and I'm stuck with that." Evidence of the results of the SSA investigations would be necessary, or at least useful, to determine H.M.'s best interests.

Without the benefit of a full evidentiary hearing, the trial did not have a record on which to determine the best interests of H.M. No admissible evidence was presented of H.M.'s condition or how H.M. was responding and would respond over time to living at a high elevation. In granting Father's request for sole custody, the trial court relied on an oral report given by H.M.'s counsel at the January 13, 2014 hearing. That report was not made under oath at the January hearing and was not offered as evidence at the August 7 hearing.

In the order granting Father sole custody, the trial court adopted the belief of H.M.'s counsel, expressed at the January 13 hearing, that Father should have sole

custody and her reasons supporting that belief. But at the August 7 hearing, H.M.'s counsel recommended that, on a temporary basis, H.M. live with *Mother*, continue to attend school in Orange County, and spend as many weekends, holidays, and "non-school time" as possible with Father. That arrangement would seem to have been the most reasonable pending a proper move-away hearing.

In reaching our conclusion, we are guided by *Seagondollar, supra*, 139 Cal.App.4th 1116, which dealt with a similar situation. In *Seagondollar*, the dissolution judgment awarded the mother and the father joint legal and physical custody of their four minor children. (*Id.* at p. 1120.) Several years later, the trial court granted the mother sole custody and permitted her to move with the children following a hearing riddled with procedural errors. (*Id.* at pp. 1119-1120.) The father had brought an order to show cause (OSC) asking the court to award him sole physical custody of the children on the ground the custody arrangement was "'unworkable.'" (*Id.* at p. 1121.) The mother did not file a responsive pleading seeking affirmative relief. (*Id.* at p. 1127.) Months later, after having represented to the trial court she did not intend to move, the mother filed her own OSC asking for primary physical custody and an order permitting her to move with the children to Virginia. (*Id.* at p. 1128.) The mother applied ex parte to have her OSC heard on shortened notice. Although the facts in support of the ex parte application merely restated the basis for seeking custody modification, the trial court heard the mother's OSC on shortened notice. (*Id.* at pp. 1128-1129.) The father moved to quash service of the mother's OSC for improper service, but the trial court denied his request to have the motion to quash heard before the hearing on the mother's OSC and request for a move-away order. (*Id.* at pp. 1129-1130.)

We reversed the move-away order on the ground that "[v]irtually from start to finish, the trial court handling this matter failed to follow or evenly apply the rules and procedures governing family law matters and, by failing to do so, denied [the father] the opportunity to be meaningfully heard." (*Seagondollar*, *supra*, 139 Cal.App.4th at

p. 1120.) Among other things, the trial court erred by not requiring the mother to file a responsive pleading to the father's OSC, not requiring the mother to file a counter-OSC requesting custody and a move-away, granting the request by the mother to have her OSC heard on shortened notice without good cause, refusing to hear the father's motion to quash before the hearing on the mother's OSC and request for a move-away order, and refusing to trail or continue the matter for three days to permit the father's rebuttal expert to testify. (*Id.* at pp. 1127-1131.) The cumulative effect of those errors was to deny the father a fair hearing. (*Id.* at p. 1127.)

This matter suffers from procedural errors similar to those which led to reversal of the move-away order in *Seagondollar*. Here, Father did not file a pleading seeking a move-away order as affirmative relief, the trial court issued the move-away order following a hearing conducted without the required notice, the trial court conducted the hearing in a 50-minute period of time inadequate for the issues presented, Father (who bore the burden of proof) presented no admissible evidence of H.M.'s medical condition, and the court acted before receiving the results of the two pending SSA investigations. The cumulative result of those errors was, as in *Seagondollar*, a custody modification and move-away order issued without Mother having an opportunity to be meaningfully heard.

This case bears another striking resemblance to *Seagondollar* in that the joint custody arrangement between Mother and Father was unworkable. Everybody involved in this case knows that. But, as we stated in *Seagondollar*—"We recognize one result of reversal is to perpetuate an unstable custody relationship: all the more reason why it is important to adhere to the correct procedures and provide a fair hearing *in the first instance*." (*Seagondollar*, *supra*, 139 Cal.App.4th at p. 1120.)

Because Father has moved to Lake Arrowhead, the issue of a move-away order is intertwined with the issue of custody. Thus, our decision to reverse the move-away order means we must also reverse the order granting Father sole physical and

legal custody of H.M. As a consequence, the custody and visitation arrangement in effect at the time of August 7, 2014 remains in effect.

DISPOSITION

The order granting Father sole legal and physical custody and permitting him to move with H.M. is reversed. The matter is remanded for further proceedings. Mother shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.